

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matter of )

Implementation of Section 25 )  
of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992 )

Direct Broadcast Satellite )  
Public Interest Obligations )

MM Docket No. 93-25

REPLY OF LORAL SPACE & COMMUNICATIONS LTD.

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June 1, 1999

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**REPLY OF LORAL SPACE & COMMUNICATIONS LTD.**

Loral Space & Communications Ltd. ("Loral"), by its attorneys, submits this Reply to the Oppositions filed in response to Loral's Petition for Reconsideration and Clarification ("Petition") of the Commission's Report and Order, in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

In its Petition, Loral sought reconsideration of the Commission's decision to define Part 25 licensees, like Loral, as "DBS providers" subject to the statutory public interest obligations when a Part 25 licensee leases or sells capacity to video programming distributors (otherwise known as "DTH providers"), regardless of whether the licensee distributes or

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<sup>1</sup> In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations, MM Docket No. 93-25, Report and Order (rel. Nov. 25, 1998).

controls the video programming. Loral argued that the Commission's decision to subject Part 25 licensees to the statutory obligations in these circumstances was contrary to the language of the statute. Loral's Petition also requested clarification of the Commission's rules regarding certification of compliance, should the Commission affirm its determination to hold Part 25 licensees responsible for the DBS public interest obligations of DTH providers.

Only two oppositions, one by the Denver Area Educational Telecommunications Consortium, Inc., and the Center for Media Education, et al. ("DAETC and CME, et al."), and one by America's Public Television Stations and the Public Broadcasting Service ("APTS/PBS"), discussed the issues raised by Loral's Petition. As a policy matter, DAETC and CME, et al. agree with Loral that Part 25 licensees that lease or sell capacity to DTH providers should not be held responsible for the DBS public interest obligations. "[T]he Commission should interpret Section 335 in a manner which imposes public interest obligations on DTH providers directly because they are the parties who control content programming and from whom the public will seek redress for service and programming concerns."<sup>2</sup>

By contrast, APTS and PBS oppose Loral's petition and refer to their comments filed on April 28, 1997, as support for disputing Loral's interpretation of Section 335(b)(5)(A)(ii).<sup>3</sup>

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<sup>2</sup> DAETC and CME, et al. Opposition/Response, at 21.

<sup>3</sup> APTS/PBS Opposition/Response, at 1-2.

However, in those comments, APTS and PBS agree that the statute requires the DBS provider to be a "distributor controlling a minimum number of channels . . . ." <sup>4</sup> This is consistent with Loral's position that Part 25 licensees are not DBS providers when they do not distribute or control the channels of video programming being delivered directly to homes. Moreover, contrary to APTS/PBS' comments, <sup>5</sup> the statute imposes public interest obligations only upon DTH providers.

The Commission has an obligation to follow the language of the statute when promulgating its rules. For this reason, Loral's Petition for Reconsideration should be granted and those Part 25 licensees that do not distribute or control channels of video programming, but merely lease or sell capacity to DTH providers, should not be subjected to or held responsible for compliance with the DBS public interest obligations.

#### **DISCUSSION**

DAETC and CME, et al. agree with Loral -- as a policy matter -- that the Commission should impose the DBS public interest obligations on DTH providers directly "because they are the parties who control content programming and from whom the public will seek redress for service and programming concerns." <sup>6</sup> In other words, because DTH providers are the entities that control

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<sup>4</sup> Comments of APTS/PBS, at 31 and note 41 (filed April 28, 1997).

<sup>5</sup> Id.

<sup>6</sup> DAETC and CME, et al. Opposition/Response, at 21.

the distribution and content of their service, the Commission should impose the DBS public interest obligations on them, not the Part 25 licensee that merely provides capacity on its satellite for the DTH service. This approach is consistent with Loral's Petition.

Loral requests that the Commission interpret Section 335(b)(5)(A)(ii) in its entirety, so as to give effect to all of its words. The statute defines a DBS provider (the entity subject to the statute's public interest obligations) as a:

. . . distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part<sup>7</sup> 25 of title 47 of the Code of Federal Regulations.

However, the Commission's rule implementing this provision inexplicably and impermissibly omits the statutory requirement that the DBS provider be the distributor that controls the video programming channels. The Commission may not disregard provisions in the statute. The courts have long acknowledged that, in construing a statutory provision, "[e]ffect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant."<sup>8</sup> It is this fundamental principle of

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<sup>7</sup> 47 U.S.C. § 335(b)(5)(A)(ii).

<sup>8</sup> Commercial Union Ins. Co. v. Scott, 999 F.2d 581, 587 (D.C. Cir. 1993) (quoting 2A Sutherland, Statutory Construction § 46.06 (4th ed. 1973)); see also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 216 (1995); Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3rd Cir. 1998).

statutory construction that is in dispute here, not the Commission's general authority to regulate both non-licensees and licensees. Because the Commission in this case ignored a key provision of the statute, it must reconsider its order and modify its rule to correspond with the plain text of the statute.

APTS and PBS contend that the DBS public interest obligations should apply to Part 25 licensees.<sup>9</sup> In support, they refer the Commission to their opening comments in the underlying proceeding.<sup>10</sup> However, in those comments, APTS and PBS agreed with Loral that the definition of DBS provider in Section 335(b)(5)(A)(ii) "refers to a distributor controlling a minimum number of channels . . . ." <sup>11</sup>

APTS and PBS also contend in their opening comments that "Section 25(b)(1) contemplates that the licensee will be the entity responsible for ensuring compliance" because the statute provides that the FCC is to impose the obligations as a condition of "an authorization."<sup>12</sup> APTS and PBS argue that because DTH providers are not "authorized," the Part 25 licensee must be subject to the obligations.<sup>13</sup> Furthermore, APTS and PBS argue that it is easier for the Commission to enforce the obligations

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<sup>9</sup> APTS and PBS Opposition/Response, at 1-2.

<sup>10</sup> Id.

<sup>11</sup> Comments of APTS/PBS, at 31 and note 41 (filed April 28, 1997).

<sup>12</sup> Id. at 31.

<sup>13</sup> Id.

on licensees and that the Commission's power to regulate non-licensees is not as "well settled as its authority over licensees."<sup>14</sup>

APTS and PBS misinterpret Section 335(b). Section 335(b)(1) provides that the Commission must require the set-aside obligations "as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service."<sup>15</sup> APTS and PBS' opening comments completely overlook the word "provision" in the statute. The requirement to provide set-aside capacity is not limited to those who have Commission authorizations; rather, the statute states that the Commission must condition any provision of direct broadcast satellite service upon the requirement that the set-aside be met. Congress did not limit the statute only to those entities who have authorizations, but included those who are providing DBS service without the need for an authorization.

As noted in Loral's Petition, Congress certainly was aware of at least one major DTH provider, PRIMESTAR, that was leasing capacity from a Part 25 licensee to provide its DTH service. By stating that the Commission was to impose the set-aside requirement as a condition of "any provision" of direct broadcast satellite service, Congress did not require an authorization. Thus, contrary to APTS and PBS' opening comments, Section 335(b)(1) can be harmonized with Section 335(b)(5)(A)(ii).

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<sup>14</sup> Id. at 33-34.

<sup>15</sup> 47 U.S.C. § 335(b)(1) (emphasis added).

The Commission cannot disregard express provisions in the statute simply to make it easier to enforce that statute.<sup>16</sup> Moreover, APTS and PBS do not provide any evidence that enforcement would be made easier by holding Part 25 licensees responsible for ensuring DTH providers' compliance. Indeed, there are few DTH providers; and with the acquisition of PRIMESTAR by DirectTV, there will be one fewer. Therefore, it will not be difficult for the Commission to enforce the public interest obligations directly upon DTH providers.

Finally, the Commission should reject APTS and PBS' argument that the Commission's authority to enforce its regulations on non-licensees is not well-settled. Certainly, this should not be an issue when the statute specifically provides that DTH providers are liable for the obligations. Moreover, this is inconsistent with the Commission's decision to hold DTH providers liable for closed-captioning requirements.<sup>17</sup> In that rulemaking, the Commission did not question its authority to enforce its rules against DTH providers, and to Loral's knowledge, that authority has not been challenged. Finally, it should be noted that many DTH providers have other FCC licenses, such as earth

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<sup>16</sup> See Commercial Union Ins. Co., 999 F.2d at 587 (If the Government's construction of a statute would render a section useless, while an alternative construction "would give[] it meaning, the Government's version cannot stand.").

<sup>17</sup> See In re Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272, at ¶ 27 (1997).



station licenses, which give the Commission additional grounds for its jurisdiction, should such grounds be required.

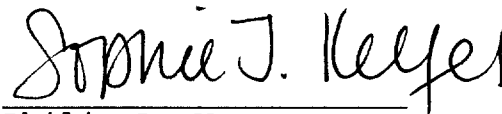
#### CONCLUSION

Neither of the Oppositions rebut Loral's Petition requesting reconsideration of the Commission's decision to impose public interest obligations on Part 25 Ku-band licensees who lease or sell capacity to DTH providers but who do not distribute or control programming. Indeed, as a policy matter, DAETC and CME, et al. agree with Loral that DTH providers should be held directly responsible. Therefore, the Commission should grant Loral's Petition for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sophie J. Keefer, hereby certify that on this 1st day of June, 1999, copies of the foregoing "Reply of Loral Space & Communications Ltd." was served via first-class U.S. mail, postage prepaid, unless otherwise indicated, on the following parties:

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